IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

LEO ZITTMAN (with whom The Chase National Bank of the City of New York was impleaded below),
Petitioner,

v.

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

No. 299

LEO ZITTMAN (with whom the Federal Reserve Bank of New York was impleaded below),
Petitioner,

v.

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER ZITTMAN

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ARGUMENT

I

Respondent's position below—reiterated in substance here—is that an unlicensed transaction in frozen funds

cannot furnish "the basis for the assertion or recognition of any interest or right in any blocked property" (Resp. Br. in the Court of Appeals, p. 23). The *Singer* and *Mellie Iran* cases, by holding precisely to the contrary, have made this position untenable. Both *Singer* and *Mellie Iran* asserted such rights. And this Court has recognized them. Today, *Singer* and *Banque Mellie Iran*—by the mandate of this Court—hold valid rights *in rem* against frozen Japanese funds vested by the Custodian—rights which rest solely upon a proscribed and unlicensed transaction in frozen funds. By reiterating his stand here—a stand rejected by this Court in *Singer* and *Mellie Iran*—respondent, in reality, asks this Court to reverse its holdings in those cases.

Respondent's brief overlooks, we believe, the decisive question in this case. The question is simply this: Since, in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, the Custodian must take the vested Japanese assets subject to the unlicensed claims of *Singer* and *Mellie Iran*, payable when licensed, must not petitioner's authorized attachment be accorded, at least, the same standing?

Everything said here by respondent against petitioner's claim—and more—can be said against the claims of *Singer* and *Mellie Iran*. Thus, the latter "sought to realize on the local assets of enemy nationals". Both contended that "New York's judicial process had given them an interest [*in rem* under *Ticonic National Bank* v. *Sprague*, 303 U. S. 406] in the property itself" as against the Custodian's licensee, the New York Superintendent of Banks. Both claims rested upon process "issued after the freeze date and without a federal license" (Resp. Br. p. 15). Both claimants asserted causes of action which arose after the inception of freezing controls and out of unlicensed transactions in frozen funds—whereas Zittman's cause of action arose in 1937, before the controls were inaugurated. Nonetheless, this Court sustained the *Singer* and *Mellie Iran* claims.

The arguments made here by respondent were pressed in *Singer* and *Mellie Iran*—both by respondent as *amicus curiae* and by Lyon as respondent's licensee. These arguments were rejected by this Court in the *Singer* and *Mellie Iran* cases, when it sanctioned the view of the New York Court of Appeals that an *in rem* claim against frozen funds, can be established by litigation so long as payment of the judgment is screened by license—a view first espoused in the *Polish Relief* case and consistently followed by the New York Courts since.

Neither General Ruling No. 12, nor Press Release No. 34, nor Public Circular No. 31 nor the alleged authority of *Propper* v. *Clark*, nor the objectives of the freezing controls, as conceived by respondent, were permitted to defeat the claims of *Singer* and *Banque Mellie Iran* in this Court. There is no valid reason why the claim of petitioner, Zittman, must be treated differently from those of *Singer* and *Banque Mellie Iran*. None has been suggested by respondent.

II

Respondent concedes that the Executive Order did not cover the attachment of frozen funds. He says (Br. p. 49):

> "Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. **Not attachments, but transfers, were controlled."**[1] (Emphasis supplied.)

[1] For the first time in this litigation, respondent concedes here that an attachment of frozen funds impresses a "lien" upon them, though he would regard the lien as "contingent" rather than "fixed" (Br. p. 49). This is a complete reversal of his position in the Court of Appeals where he argued that the "acquisition of a lien" was banned (Resp. Br. in the Court of Appeals, pp. 15-16).

It seems to us that this concession is decisive of the case. If, as is conceded, petitioner's attachment was not controlled, the rights created by his levy are to be found in the law of New York—not in the freezing controls. Under New York law, petitioner acquired in the attached accounts "a fixed and present lien which will have recognition and enforcement everywhere." (Cardozo, J. in *Sanders* v. Armour Fertilizer Works, 292 U. S. 190, 208, citing *Embree* v. *Hanna* [N. Y.] 5 Johns, 101; see cases cited in our main brief, page 32, footnote 29). It is petitioner's position that he is entitled to claim that lien.

To defeat petitioner's claim, respondent must show that the New York law is otherwise. He does not satisfy that burden by arguing (Br. pp. 46, 47) that Illinois and California accord the attaching creditor only an "inchoate" or "contingent" lien.[2] Petitioner attached in New York where it is clear—and undisputed—that his lien is "fixed and present".

Nor is it relevant that in some states, e.g. Wisconsin, *in rem* jurisdiction may be secured by means other than, or in addition to,[3] attachment (Resp. Br. pp. 44-46). Here, the means employed by petitioner was attachment. It suffices that this means—as respondent admits—was permitted by the freezing controls.

It adds nothing to speculate, as does respondent, on what would have been petitioner's rights had he attached elsewhere than in New York or had he resorted to processes other than attachment to achieve *in rem* jurisdiction.

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[2] Had petitioner attached in Illinois or California, his "inchoate" attachment lien would have become fixed when he recovered judgment on March 27, 1942 (R. 50)—some four and one half years before respondent vested (R. 6). Therefore, even under the law of those states petitioner would have a perfected lien antecedent to the Custodian's vesting.

[3] It is true as respondent claims (Br. p. 45) that, under Sec. 232(6) of the New York Civil Practice Act, an *in rem* action may be maintained—without attachment—in equity actions brought to exclude the defendant from an interest in specific property. However, that section was not available to petitioner who sued the German banks at law to recover a money judgment.

III

Respondent contends that petitioner must be defeated if the objectives of freezing are to prevail.[4] The argument is that the controls were intended not only to protect local property against Axis conquest but to immobilize the frozen property for vesting so that it could be utilized by our Government in prosecuting the war[5] (Br. pp. 19-20) and for possible distribution among American claimants (Br. p. 21). To permit petitioner to prevail, it is said, would defeat, *pro tanto*, this vesting purpose.

Respondent's view assumes that, in enacting the Joint Resolution on May 7, 1940—some nineteen month before war came—Congress set up the freezing controls as an aid to confiscation by vesting. The assumption is untenable.

The controls did not purport to confiscate or expropriate the controlled property. They did not purport to immobilize property for later vesting under the Trading With the Enemy Act. Since we were not then at war, there was no power to vest. There could be no purpose to freeze property in support of the power to vest—which did not then exist—in order to facilitate the prosecution of a war—in which we were not then engaged. No such purpose can be found in the Congressional materials. In

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[4] It is important to note that the objectives pertinent here are those which underlay the Joint Resolution, 54 Stat. 179. The First War Powers Act (55 Stat. 839), passed on December 18, 1941—after Zittman had attached—furnishes no guide for ascertaining the aims of the freezing controls prior to its enactment. Like General Ruling 12, the First War Powers Act had criminal sanctions and, so could not be given retroactive force. See our main brief, page 36.

[5] Respondent's own office has disavowed this purpose. Thus, Robert M. Vote of the Estates and Trusts Branch of the Office of Alien Property says the following in his work *Alien Property Litigation in World War II* (1949) at page A-2: "* * * Freezing controls could not avoid the dereliction or destruction of enemy-owned property. Nor did freezing controls afford a means by which this Government could acquire the property and use it for its own war effort. * * *"

truth, on May 7, 1940, Congress had no concern with who should own the frozen funds or credits ultimately so long as they were kept from the Axis.

The controls of the Joint Resolution applied to the property of all the designated nationals. All were alien friends, since we were not at war with any. Some were alien friends—laboring under the Axis yoke—with whom we were not only friendly but to whom we were openly sympathetic. It is unthinkable that Congress would attempt by the Joint Resolution to freeze, for future confiscation by vesting, the property of France, Norway, Denmark, China and others of our alien friends. The Congressional materials disclose only the purpose to protect—not confiscate—such property.[5a] Construed as a measure to facilitate confiscation, the Joint Resolution would be a complete reversal of our traditional policy toward the property of alien friends; it would, indeed, be patently unconstitutional under the Fifth Amendment. *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79, 81; *Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 489, 491.

To regard the controls of the Joint Resolution as a mere adjunct to respondent's vesting power would, of course, permit the respondent to confiscate more property. But nothing said by Congress in the Joint Resolution of May 7, 1940, permits this view of freezing. The scope and purpose of the Resolution cannot be enlarged merely to facilitate the Attorney General's confiscatory aims. *Ex parte Endo*, 323 U. S. 283.

Respondent says that the Joint Resolution should be regarded as confiscatory in purpose so that respondent may have more funds to expend under certain post-war statutes. This Court should strike down petitioner's attachment, he says, because this would increase the fund to

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[5a] The Treasury expressed the purpose thus: "At its inception, Foreign Funds Control had as its primary purpose the protection of the assets within the United States of invaded countries in order to prevent their falling into the hands of the invaders and in order to protect American institutions from possible adverse claims." U. S. Treasury Dept., *Administration of the Wartime Financial And Property Controls of the United States Government* (1942), p. 3.

be administered by respondent under a 1946 amendment to the Trading With the Enemy Act; would swell the fund created by the War Claims Act of 1948; and would augment this country's share of reparations under the 1946 Paris Agreement on Reparations (Resp. Br. pp. 19-24).

To be sure, petitioner's defeat here would serve the convenience and profit of the Government under these post-war enactments. But these are not the criteria by which the courts of our land measure the validity of private rights. To defeat petitioner's rights here respondent must show that Congress intended that the 1940 Joint Resolution should be confiscatory in purpose. He does not make that showing by arguing that—due to post-war enactments—the Government will have more money to spend if the Joint Resolution be construed as confiscatory. The objectives of the Joint Resolution cannot be changed as one would change the oil in his automobile. We cannot drain out of the Joint Resolution its 1940 purpose to protect local assets against Axis conquest and pour into it the purpose to confiscate in aid of post-war ends.

If, as respondent says, the true aims of freezing were ultimate confiscation of frozen funds for the profit of the Government and for ratable distribution among American claimants, both the respondent and the Treasury have flouted those aims over and over again. Both have licensed the payment of frozen funds—of alien friend and enemy alike—to satisfy the claims of citizens (R. 66-67). In fact, respondent licensed payment of the claim of Banque Mellie Iran—an alien—out of frozen Japanese funds even while the claim was pending before this Court.

If the aims of freezing are correctly stated by respondent, by what right did he license these claims and, thus, prefer them above the claims of others and, indeed, above the alleged interest of the Government itself? Should not the licensed funds have been kept intact for confiscation by the Government as reparations and for expenditure under the War Claims Act?

Respondent's actions, it seems, belie his words. In action, respondent—like his predecessor the Secretary of

the Treasury—treated the controls as a screening process purely and simply. He cannot, with good grace, ask this Court to treat them otherwise.

IV

Respondent concedes that—because the *Chase* case, No. 298, involves only a "right, title and interest" vesting order—there is no issue here as to the "Custodian's paramount power to vest" (Resp. Br. p. 27). This concession at once distinguishes the instant case from *Propper* v. *Clark*, 337 U. S. 472. The latter—so this Court has said in *Lyon* v. *Singer*, 339 U. S. 841, 842—turned upon the fact that Propper "claimed title to frozen assets" against the "Custodian's paramount power to vest".[6]

To check the force of this concession, respondent questions this Court's appraisal of the *Propper* case. Contrary to this Court's view, respondent asserts that the *Propper* case, too, involved only a "right, title and interest" vesting order and not the paramount power of the Custodian to vest (Resp. Br. p. 27). If it be true—as respondent intimates—that this Court misunderstood the *Propper* case, this is but a further reason, we submit, why the *Propper* case should not be followed here.

Respondent acknowledges that the *Propper* case dealt with an unlicensed transfer of title in contrast to the instant case, which deals only with a lien premised upon an authorized attachment. He says the distinction is "without substance"; that the *Propper* case is all inclusive and inter-

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[6] Respondent asserts here that the attached German bank accounts were enemy property on the freeze date, June 14, 1941 and that the Custodian's vesting orders of October 1946 (R. 9, 14) reaches them retroactively (Resp. Br. pp. 26-27). The contention is patently unsound for at least two reasons. *First*, we were not at war June 14, 1941. Therefore, (a) the bank accounts were not enemy owned and (b) there was no Custodian and no vesting power. *Second*, under the Fifth Amendment, the Custodian's vesting is subordinate to the prior rights of others in the vested property. *Miller* v. *Kalkwerke*, 283 Fed. 746, 757-758; *Commercial T. Co.* v. *Miller*, 281 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79.

dicts both (Resp. Br. pp. 16-17, 20). We are of a different opinion.

In our view, in limiting the *Propper* holding to transfers of title, this Court made a deliberate choice. It was fully aware of the fact that the freezing controls "did not prohibit all transactions without license" involving frozen property. 337 U. S. 472, 480. This Court concluded that the Joint Resolution effected "a valid plan for control of the property covered by the regulation that prohibited any change of *title* to that property". And this Court expressly premised its "determination on the purpose of Congress to prevent shifts in *title* to blocked assets". 337 U. S. 472, 486. It must be assumed that these explicit and repeated references in *Propper* to transfer of title—used by this Court in expressing its "conclusion" and the basis of its "determination"—were a deliberate, not a casual, choice.

That this Court limited the *Propper* holding to transfers of title is emphasized by its express refusal to decide "whether every determination of rights concerning blocked property in unlicensed litigation is voidable." 337 U. S. 472, 486.

The *Propper* case is no more dispositive here than it was in *Singer* and *Mellie Iran*.

V

Respondent asserts that the Treasury's position, as expounded by him here, was accepted in the *Polish Relief* case (Br. p. 42). We believe that the respondent has misapprehended the holding.

The Treasury, as we understand it, presented two main points to the New York Court of Appeals. *First*, it urged that the Secretary had authorized the bringing of an attachment action (Treasury Br. p. 39). *second*, that the attachment created a "contingent interest" which was "null and void unless authorized by the Secretary". (Treasury Br. p. 52.)

As to the *first*, the Treasury and the New York Court of Appeals were in agreement that an attachment action

was permitted—though their conclusions rested on different premises. The Treasury view was that the right to attach existed by reason of Treasury authority. The New York Court of Appeals took the view that the "Executive Order did not forbid attachment * * * " (288 N. Y. 332, 338).

As to the *second*, the New York Court of Appeals flatly rejected the Treasury position that the attachment effected only a contingent interest, saying at page 338, " * * * These actual liabilities [the attached bank accounts] were not transmuted into contingent obligations merely because the Executive Order had adventitiously put a stay upon them."[7]

There can be no doubt as to the holding in the *Polish Relief* case when this case is considered together with *Feuchtwanger* v. *Central Hanover Bank & T. Co.*, 288 N. Y. 342, decided the same day. In the *Feuchtwanger* case the New York Court of Appeals held that the courts of New York could—without Treasury license—take jurisdiction of frozen funds in an *in rem* proceeding and declare the frozen funds to be impressed with a trust in plaintiff's favor, limiting the need for a license to the point at which title to the funds was to be transferred from an account in the name of defendant to one in plaintiff's name. When the *Polish Relief* and *Feuchtwanger*[8] cases are read to

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[7] Upon analysis, it would appear that the Treasury's view was rejected by both the majority and the minority in the *Polish Relief* case. The majority did so because they found that the freezing controls permitted a valid—not a "conditionally null and void"—seizure by attachment of the frozen funds and so met the dictates of *Pennoyer* v. *Neff*. The minority found, in effect, that the attachment of frozen funds did not effect a seizure within the requirement of *Pennoyer* v. *Neff*. This was a repudiation of the Treasury view that a seizure, which was "conditionally null and void", would sustain a valid attachment.

[8] The concurring opinion in the *Feuchtwanger* case notes that the parties did not argue the force of Exec. Order 8389. The holding of the majority, however, must be taken to have considered the effect of the Executive Order. Had the Order forbidden what the judgment in the case undertook to do, the N. Y. Court of Appeals would have been under a duty to have noticed the question on its own motion. *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261.

gether, it is clear that the New York Court of Appeals held precisely as respondent has stipulated here, viz., that the freezing controls did not limit an attachment and that only payment of the ensuing judgment was to be screened by Treasury license.

VI

Respondent contends (Br. p. 12) that attachments are controlled because they fall within Section 1E of the Executive Order.[9] An attachment, he says, is a "transfer" or "dealing in" evidences of indebtedness or evidences of ownership of property within the scope of Section 1E. (This utterly contradicts his later statement [Br. p. 49] that "Not attachments, but transfers, are controlled.")

The contention is wholly without basis. An attachment is not a "transfer." (See our Main Br. p. 32.)[10] Nor, indeed, is a bank account an "evidence of indebtedness" or an "evidence of ownership of property" within the meaning of Section 1E. The evidence is overwhelming that these phrases were incorporated into the Joint Resolu-

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[9] Respondent (Br. p. 12, note 8) also suggests that an attachment is a "transfer of credit between * * * banking institutions" and therefore is encompassed by Sec. 1A of Exec. Order 8389. The suggestion is without basis. The levy of Zittman's warrant of attachment impressed a lien upon the credit of the German banks with the Chase—not a transfer of the credit (Our Main Brief p. 32). There was no "transfer of credit" as this term has been defined by this Court. *Propper* v. *Clark*, 337 U. S. 472, 480. Moreover, the Sheriff levies the warrant as the officer of the state. *Stojowski* v. *Banque de France*, 294 N. Y. 134, 145. The State of New York is not a "person" within the meaning of Executive Order 8389 (Sec. 5C) and, accordingly, is not a "banking institution" as defined in the Order, Sec. 5F. Cf. *U. S.* v. *United Mine Workers*, 330 U. S. 258, 275; *U. S.* v. *Cooper*, 312 U. S. 600, 604. Therefore, a transfer of the account—if one were involved— from the Chase to the Sheriff would not be one between "banking institutions."

[10] General Ruling 12(5) defines "transfer" so at to include "attachment." The definition is not relevant here because petitioner attached long before the General Ruling was issued.

tion—and thereby into Section 1E—solely to bring stocks and bonds within the regulatory scheme.

Prior to enactment of the Joint Resolution, the Treasury had ruled that stocks and bonds were covered by the statute (Gen. Ruling No. 2; 5 F. R. 1474). Certain New York banks challenged the ruling. The phrases "evidences of indebtedness" and "evidences of ownership of property" were added by the Resolution to resolve the doubt [11] and to make explicit that which the Treasury had inferred—namely, that transfers of stocks and bonds were within the plan of the controls. This is inescapable from the following statement by the Treasury itself, at whose urging the Joint Resolution was adopted:

> "1. Securities
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> "When the first Executive Order establishing the freezing control was issued on April 10, 1940, it was realized that if the Control was to be effective in preventing the assets of the invaded countries from falling into the hands of the invaders and being liquidated by them, a method must be found to prevent the looting and disposition of securities. Although the Order as issued contained no specific reference to securities, it was the purpose of this Government in issuing the Order to include the control of securities within its scope. Some question arose, however, at the outset, as to whether the Trading With the Enemy Act of the First World War, upon which the Order was based, gave authority for the extension of the Control to securities. The Treasury Department immediately clarified its position on this question by issuing General Ruling No. 2 and stating that the Control did extend to securities. *In order, however, to erase any doubt which might have existed, Congress immediately enacted supplementary legislation our-*

[11] H. Rep. No. 2009, 76th Cong., 3d Sess., 1940; S. Rep. 1946, 76th Cong., 3d Sess., 1940; Senator Wagner in 86 Cong. Rec. 5006.

suant to which the Order was amended so as clearly to include securities within the scope of the Control." [12]

The plain fact is that the controls did not extend to suits or attachments. The Treasury recognized this limitation on its power when it acknowledged that attachments "were not forbidden" (R. 66).

Respondent insists that—despite what the Treasury said—this Court must find that the Treasury did not waive its control over attachments (Br. pp. 28-31). The question is not one of waiver. Rather, it is whether the Joint Resolution permitted the Treasury to control attachments. In ruling that under the freezing controls "no attempt is made to limit" suits or attachments, the Treasury merely acknowledged that the limits of its power under the Joint Resolution left it no other choice.

The Treasury did reserve the right to screen payments. In this, it was clearly within its rights under Sec. 1B of the Executive Order. Had the Treasury believed that Sec. 1E, or any other section of the Executive Order, empowered it to proscribe suits and attachments, it may be assumed, safely, that it would have reserved the authority to license these as well as payment of any judgment in the action.

VII

Respondent stands largely on General Ruling 12—though he fails to meet our point that it cannot be applied, retroactively, to petitioner's attachment. (See our Main Brief pp. 36-37.)

He says that Subdivision 4 of General Ruling 12—though it permits attachment of frozen funds—must be read, due

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[12] U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 20-1. See also *U. S.* v. *Leiner*, 2nd Cir., 143 F. 2d 298, 300; brief for United States, *amicus curiae*, p. 16, in the *Polish Relief* case.

to the proviso, as limiting the interest created by the attachment to such as the owner of the blocked account could confer by voluntary act. He assumes that the owner could confer nothing by his voluntary act and that, therefore, the proviso sterilizes the preceding grant of authority to attach.

The assumption is invalid. In *Lyon* v. *Singer*, the voluntary unlicensed act of a blocked national, Yokohama Specie Bank, was held to confer on Singer's assignor valid rights to the conveyed funds (299 N. Y. 791)—rights sanctioned by this Court as against the New York Superintendent of Banks acting for the Custodian.

If, as held in *Lyon* v. *Singer*, the voluntary act of a blocked national is effective to create valid rights, the proviso is meaningless; it does not detract from the authority to attach granted in the opening clause of Subdivision 4.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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